BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOSE HERNANDEZ	)	
Claimant	)	
	)	
VS.	)	Docket No. **225,823**
	)	
MONFORT, INC.	)	
Self-Insured Respondent	)	

ORDER

The claimant appealed the June 19, 2000 Award of Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on December 13, 2000.

APPEARANCES

Claimant appeared by his attorney, Joseph Seiwert. Respondent and insurance carrier appeared by their attorney, Terry Malone. There were no other appearances.

RECORD & STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

1. The nature and extent of claimant's disability.

2. At oral argument, claimant raised the issue of average weekly wage.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition to the stipulations of the parties, the Board makes the following findings of fact and conclusions of law:

The claimant sustained a work-related injury on October 15, 1996. On that date, the claimant testified that he was picking up hocks thrown on the floor. The clean-up involved filling and moving barrels weighing approximately 200 pounds. By the time he got home that evening, his lower back had begun to hurt. However, the claimant did not initially connect the pain with work because he thought he was having kidney problems. The next day he advised the plant nurse that his back was hurting and went to see his personal physician. The personal physician diagnosed back strain and imposed work restrictions. The claimant was then referred to Dr. Zeller, the company physician. The claimant received conservative treatment and was off work for approximately a month.

When he returned to work, there was a gradual recurrence of discomfort in his back. Ultimately, an MRI scan demonstrated a left side L4-5 disc herniation and the claimant was having radicular complaints correlating with the disc herniation. The claimant was then referred to Dr. Abay and on February 11, 1998, the doctor performed a left hemilaminectomy at L4-5 with diskectomy. After a course of physical therapy following surgery, the claimant was released to regular duty on April 28, 1998.

The claimant had an increase in symptoms upon his return to work following surgery and an MRI scan on June 18, 1998, demonstrated post surgical changes with epidural fibrosis but no recurrent disc herniation or significant spinal stenosis. At the time of the regular hearing, the claimant continued to work for the respondent.

At oral argument before the Board, the claimant raised the issue of average weekly wage as well as the nature and extent of disability. The claimant contends the average weekly wage should be computed based upon a 48-hour work week. The claimant further contends that because he is not earning 90 percent of his pre-injury gross average weekly wage he is entitled to a work disability.

The claimant testified that at the time of the accident he was a lead person and was required to work approximately two hours more than the people he supervised. He further testified that both he and the workers he supervised were normally scheduled to work five and sometimes six days a week.

The respondent's human resources director testified that the union contract provided a full-time employee a guarantee of 34-hours per week but the goal was to actually work 48-hours a week. He further testified that when a full-time employee is hired they are advised that they work Monday through Saturday. The determination of whether an employee will be required to work Saturday is made the preceding Friday. The employees must keep their Saturdays open. Moreover, he testified that on the weeks when a shift only works 32 hours it could still be a 6-day work week with just fewer hours per day.

K.S.A. 44-511(b)(4)(B) provides that the computation of the average gross weekly wage is determined by multiplying the daily money rate by the number of days and half

days that the employee usually and regularly worked or was expected to work. In *Tovar v. IBP, Inc.*, 15 Kan. App.2d 782, 817 P.2d 212 (1991), it was stated:

> "If an employee is told that he is to keep Saturdays open and available for work, it appears to us that this is tantamount to a directive that he is expected to work each Saturday. Whether he does or not is largely irrelevant because the statute bases compensation on the number of days per week an employee is 'expected' to work, not the number of days an employee is guaranteed to work or actually does work."

The uncontradicted testimony in this case is that respondent's employees are told when hired that they work Monday through Saturday and that they must keep Saturdays open and available for work. Further, it was claimant's uncontradicted testimony that he did work on some Saturdays. The respondent did not proffer any exhibits detailing how frequently the claimant was required to work a six-day week. It is therefore the Board's determination that the claimant has met his burden of proof to establish that he worked a 6-day work week and his average weekly wage should be computed on the basis of a 48-hour work week.

The claimant's hourly rate on the date of accident was $10.40. The hourly rate times 48 hours per week yields $499.20. The average weekly overtime is the total amount earned by the employee in excess of the of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident.[1] Based upon Exhibit 4 to the Transcript of Proceedings, dated December 13, 1999, the claimant's overtime in excess of the amount of straight-time money totaled $2,081.67. This sum divided by 26 equals an average weekly overtime of $80.06. The straight-time weekly rate plus the overtime yields a total gross average weekly wage of $579.26.

The Administrative Law Judge awarded the claimant a 10 percent permanent partial general body functional impairment but concluded that the claimant was not entitled to a work disability. The claimant contends the Administrative Law Judge erred because the claimant is earning less than 90 percent of his pre-injury gross average weekly wage.

It is undisputed that at the time of the regular hearing the claimant's hourly rate was $10.50. It is equally undisputed that overtime had been virtually eliminated for the claimant after his surgery. A careful review of the wage exhibits attached to the regular hearing transcript reveal that from the time the claimant was placed on light duty before his surgery and through the intervening time period until the regular hearing the claimant only worked three hours of overtime. It is also uncontroverted that the claimant did work all available

---

[1] K.S.A. 44-511(b)(4)(B)(iii).

overtime. Thus, the claimant at regular hearing was earning a gross average weekly wage of $504 ($10.50 times 48 equals $504).

As previously determined, the claimant's gross average weekly wage at the time of his injury was $579.26. The claimant's gross average weekly wage of $504 at the time of the regular hearing is approximately 87 percent of his pre-injury gross average weekly wage. Ordinarily, this finding would entitle the claimant to a work disability.[2]

The claimant's hourly rate at the time of the regular hearing was 10 cents an hour more than he was earning at the time of injury. The respondent argues and the record supports the contention that the reduction of the claimant's gross average weekly wage was due to the reduction in the amount of claimant's overtime. The human resources director testified that, for financial reasons, there were efforts to reduce the amount of overtime and almost all unscheduled overtime at the plant had been reduced. It is significant to note this reduction in overtime was plant wide and not just limited to the claimant. Moreover, the human resources director's uncontradicted testimony was that because of changed job duties a lead person no longer works more hours than the employees he supervises.

Following his surgery, the claimant returned to work on the slaughter side of the respondent's plant. When claimant returned to work his hourly rate of pay fluctuated but was never less than 90 percent of the pre-injury hourly rate of pay. With pay raises the claimant was earning a higher hourly rate at the time of the regular hearing than his hourly rate at the time of the accident. The uncontroverted testimony was that the claimant was physically able and did work any available overtime. The evidence establishes that the current reduction in the claimant's gross average weekly wage is not related to his restrictions imposed because of his work-related accident but is instead related to his employer's economic business decisions.

Does the respondent's business decision to eliminate overtime preclude a work disability in this case? Intrinsic to the Act is a requirement that there be some type of causal connection or nexus between the injury and the disability for which the benefits are being awarded. The injury must arise out of the employment.[3] In the case of work disability this requires, in our view, a nexus between the injury and both the task loss and the wage loss. K.S.A. 44-510e. In the case of the task loss, the causation requirement is obvious. The task loss factor is based on loss of ability resulting from the injury. In the case of wage loss, the causation requirement is less explicit. The express language of K.S.A. 44-510e requires only a calculation of the percentage difference between the wage

---

[2] K.S.A. 1996 Supp. 44-510e(a).

[3] *Craig v. Electrolux Corporation*, 212 Kan. 75, 510 P.2d 138 (1973).

at the time of the injury and the wage after the injury. On its face, the language of the statute suggests the reason for the change in pay is irrelevant. Nevertheless, the Board believes the fundamental function and purpose of the Act requires that there be a nexus between the injury and the wage loss before that loss can be a factor used to calculate the amount of benefits.

When the claimant changes jobs, or changes to a lower-paying accommodated employment because of the injury, other factors may also influence the new wage, but the injury is the cause of the wage change. In such cases the Board has consistently used the actual wage so long as the claimant has made a good faith effort to obtain and retain employment.[4] The Board has not required the claimant to show what portion of the change in wages is due to the injury and what is due to other factors. It is enough that the wage change would not have occurred but for the injury. Even later changes in that wage, up or down, have some causal connection to the injury through the initial job change.

Changes in the wage resulting from changes in the business practices or other factors may not be in any way caused by the injury. The wage change would have occurred regardless of the injury. The Act was not intended as a wage guarantee. A subsequent change in pay which reduces the pay to less than 90 percent should not automatically trigger work disability. It should not unless the change is shown to be the result of the injury. To do otherwise, in our view, violates the fundamental requirement that the disability be caused by the injury.

The board is not unmindful that unemployment or job change due to economic change, such as a layoff, can result in a work disability.[5] In *Lee v. Boeing*, 21 Kan. App.2d 365, 899 P.2d 516 (1995), it was stated:

> "It is not the intent of the legislature to deprive an employee of work disability benefits after a high-paying employer discharges him or her as part of an economic layoff where the employer was accommodating the injured employee at a higher wage than the employee could earn elsewhere."

Retaining an employee in a job that pays a comparable wage artificially avoids a work disability until the worker is exposed to the open labor market wherein a work disability may be revealed.[6] Herein, the claimant has neither been discharged nor placed

---

[4] *Oliver v. The Boeing Company-Wichita*, 26 Kan. App.2d 74, 977 P.2d 288, *rev. denied* ___Kan.___ (1999).

[5] *Gadberry v. R.L. Polk & Company*, 25 Kan. App.2d 800, 975 P.2d 807 (1998).

[6] *Watkins v. Food Barn Stores, Inc.*, 23 Kan. App.2d.2d 837, 936 P.2d 294 (1997).

in a lower paying job, instead, a plant wide elimination of overtime resulted in a decrease in his average weekly wage.

This case provides a unique situation where the claimant returned to work with restrictions but continued to earn an hourly rate of pay that was never less than 90 percent of the pre-injury hourly rate. Although the claimant did not return to the same position as a lead worker, he did return to the slaughter side and his hourly rate of pay ultimately increased. Had the claimant returned to the lead worker position, he still would not have accumulated more overtime hours because the job duties of that position had changed. The lead worker no longer worked more hours than those he supervised. If a comparison is made of his hourly rate of pay at the time of the accident and his hourly rate of pay post-injury, the claimant has not sustained a wage loss. This unique factual situation warrants a finding that the claimant has not sustained a wage loss because the wage reduction is based upon economic factors affecting all of the respondent's employees and not just the claimant. The reduction in overtime wages is not based upon any physical limitations of the claimant. The claimant, therefore, has not proven a nexus between the injury and the fact that he now earns less than 90 percent of the pre-injury gross average weekly wage. In our view, he is not entitled to a work disability.

The evidence regarding the claimant's functional impairment consisted of the testimony of Drs. Brown, Koprivica and Mills. Dr. Brown opined that the claimant had a 10 percent permanent partial whole body impairment of function as a result of his work-related injury. Dr. Koprivica opined that the claimant had a 20 percent permanent partial whole body impairment of function as a result of his work-related injury. Dr. Koprivica conceded that using the DRE models of the AMA Guides, Fourth Edition, the claimant would have a 10 percent permanent partial whole body impairment of function. Pursuant to court order, Dr. Mills provided claimant's independent medical examination and opined that the claimant had a 10 percent permanent partial whole body functional impairment. It is the Board's determination that the claimant has met his burden of proof that he is entitled to compensation for a 10 percent permanent partial whole body impairment of function.

It should be noted that the modification of the claimant's gross average weekly wage does not affect the award calculation because the claimant was limited by the maximum permanent partial disability compensation rate of $338 under either gross average weekly wage determination.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated June 19, 2000, is modified to reflect the average weekly wage is $579.26 and affirmed in all other respects.

IT IS SO ORDERED.

Dated this _____ day of March 2001.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

Copies to:

Joseph Seiwert, Claimant's Attorney
Terry Malone, Respondent's Attorney
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Workers Compensation Director